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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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In re T.C. et al., Persons Coming Under the Juvenile  
Court Law.

C087857

SAN JOAQUIN COUNTY HUMAN SERVICES  
AGENCY,

(Super. Ct. No.  
STK-JV-DP-2017-0000140)

Plaintiff and Respondent,

v.

K.C.,

Defendant and Appellant.

Father of minors T.C. and B.C. appeals an order of the juvenile court terminating his parental rights pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup> He

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

contends the court's determination to proceed with the section 366.26 hearing while he was incarcerated and without a waiver of appearance violated Penal Code section 2625, subdivision (d), and California Rules of Court, rule 5.530(f)(1)(A). After careful consideration, we will affirm the juvenile court's orders.

#### FACTUAL AND PROCEDURAL BACKGROUND

The minors, T.C. (born in March 2014) and B.C. (born in June 2016), first came to the attention of the Solano County Health and Social Services, Child Welfare Services (CWS) on July 26, 2016, when father was arrested for violating his parole by failing to submit to random drug testing and car theft and mother was arrested for car theft. A search of the stolen vehicle revealed a box of hypodermic needles, car stereos, and a stolen credit card. The parents and the minors were living in a different vehicle which officers found to be littered with old food wrappers, dirty diapers, dirty clothes, and other debris.

On July 28, 2016, CWS filed a dependency petition alleging, pursuant to section 300, subdivision (b), failure to protect the minors due to the parents' history of substance abuse, domestic violence, and homelessness; mother's untreated psychiatric disorders; father's history of absconding from the Department of Corrections and Rehabilitation and, pursuant to section 300, subdivision (g), failure to provide support due to the parents' respective incarcerations. The minors were detained and placed in protective custody. Services and visitation were ordered for both parents.

In an August 3, 2016 interview, father admitted he was addicted to heroin and had been using methamphetamine off and on since he was 16 years old. He claimed both he and mother stopped using heroin "a few months" before the interview.

The September 2016 disposition report stated father remained incarcerated and therefore had not had the opportunity to participate in services. He was advised that substance abuse services and counseling groups were available to him in jail but that he would need to make a request to jail administrators to participate. According to the

report, father did participate in weekly Internet video visits with the minors supervised by the maternal grandmother, during which father was “engaged and attentive to the children.”

At the September 15, 2016 disposition hearing, the Solano County Juvenile Court sustained most of the allegations in the petition, dismissed the subdivision (b)(2), (b)(5), and (g)(2) allegations, and ordered reunification services to both parents. Mother requested that the case be transferred to San Joaquin County.

According to the March 9, 2017 status review report, father had been transported to Deuel Vocational Institution (DVI) in San Joaquin County, where he was scheduled for release on March 27, 2017, and was assigned a parole officer in Sacramento County. The report stated father’s participation in domestic violence services was lacking in that he denied any domestic violence between him and mother. During a December 2016 phone conference, he became upset when the social worker discussed concerns regarding the impact of the domestic violence on the minors. Despite mother’s admission that her relationship with father was emotionally, mentally, and physically abusive and that she and father hit each other during verbal arguments, father continued to deny any domestic violence, claiming he and mother only had a “scuffle” and that mother had been bruised “because she’s a woman.” Father’s anger escalated during the phone call and he accused CWS and his family of not supporting his relationship with mother and proclaimed they were going to be together and “nobody can stop us.” Father reportedly participated in approximately 10 hours of parenting/family reunification classes, 12 hours of relapse prevention, and at least 12 hours of anger management classes. However, when discussing his history of substance abuse during the December 2016 phone call, father denied having a substance abuse history.

Father participated in Internet visitation with the minors via “iWeb” while incarcerated in Solano County. However, following his transfer to DVI, he was not permitted to have any visitation given his status as a registered sex offender.

CWS reported father's progress toward alleviating or mitigating the causes necessitating removal of the minors was "minimal," noting that while he participated in various groups related to anger management, parenting, and substance abuse, CWS was not able to fully assess his willingness or capacity to address the issues that led to removal of the minors. CWS staff noted its "great concern" regarding the "dysfunctional dynamics" between father and mother, stating, "this risk alone, would require intense oversight, when assessing [father's] ability to parent his children in a safe and healthy manner." CWS staff also expressed concern over the parents' relationship given their history of domestic violence and their continued minimization of the dysfunctional dynamics between them. The social worker remarked that father's "emotional deregulation and manipulative tendencies have been evident during in person visits" and were documented in letters written by father to the social worker and mother.

On March 9, 2017, the Solano County Juvenile Court ordered the dependency matter transferred to San Joaquin County. The San Joaquin County Juvenile Court accepted the transfer and ordered both parents were assessed for drug court.

The September 7, 2017 status review report stated father was now incarcerated at the Rio Consumnes Correctional Center (RCCC) in Sacramento County, and had been incarcerated twice since transfer of the dependency case to San Joaquin County for removal of his GPS tracking device. Father had one supervised visit with the minors on June 6, 2017; however, the visit was ended early due to father's aggressive behavior toward staff. Father reportedly refused to comply with any case plan services. The San Joaquin County Human Services Agency (Agency) recommended termination of father's reunification services and requested placement of the minors with mother, who was reportedly in compliance with her case plan.

At the September 7, 2017 status review hearing, the court was advised that father remained in custody and mother and the minors resided with the maternal grandparents.

The court ordered the provision of family maintenance services to mother and termination of father's reunification services.

On January 23, 2018, the Agency filed a supplemental petition pursuant to section 387 seeking removal of the minors from mother's custody due to mother's engagement in domestic violence relationships, despite receiving counseling for victims of domestic violence. In particular, the petition alleged father called mother on October 15, 2017, and threatened her stating, "Fuck[,] . . . the way you make me feel, makes me feel like I want to put a bullet through your head. But I am not going too [*sic*]." The next day, father called mother and asked her to meet with him. When she refused, father said, "I don't care if you're recording this. I am going to make it known; I am coming to get you. Bullets will be sprayed." Father was subsequently arrested for violating his parole. Mother eventually obtained a restraining order to protect herself from father. The petition further alleged that mother's current boyfriend, T.H., "beat her up" in front of minor T.C., and that mother went to the hospital on January 2, 2018, and tested positive for opiates. Finally, the supplemental petition alleged mother continued to abuse drugs and alcohol, despite having participated in substance abuse treatment.

At the status review hearing on January 25, 2018, at which father was present, the court ordered the minors detained and placed with the maternal grandparents and prohibited unauthorized visits by mother. The court further ordered supervised visitation for both parents.

Father and mother were present at a review hearing on February 1, 2018. Both parents submitted on the allegations in the amended supplemental section 387 petition. The court found the amended allegations true and exercised jurisdiction over the minors. Father's counsel informed the court that father was "fully engaged in his program" and was requesting supervised visits with the minors. The court ordered father to attend drug court and ordered him to follow the instructions of his case manager, attend and complete

counseling, refrain from drugs and alcohol, and drug test. The court also ordered supervised visitation for father.

The March 2018 disposition report reiterated that father was in a residential program in Yolo County on April 27, 2017. On May 1, 2017, he was instructed to complete drug treatment in Yolo County. On June 6, 2017, father refused to participate in drug court. When the court encouraged him to speak to his attorney, father responded, "I won't be here." Father was thereafter terminated from drug court. Father also refused to comply with his case plan, any counseling services, or any parenting classes. As mentioned *post*, his reunification services were terminated on September 7, 2017, after receiving 12 months of services.

The report stated father was released from his most recent incarceration in January 2018, but failed to complete a drug and alcohol program or a domestic violence batterer's program. Father had supervised visits with the minors once a week, but was unable to schedule additional visits because he lacked transportation.

Neither parent attended the March 8, 2018 dispositional hearing, at which time the court terminated mother's reunification services, set the matter for a section 366.26 hearing, and ordered writ notices sent to each parent.

On March 9, 2018, the Agency sent notice of the section 366.26 hearing to father and his counsel. On March 26, 2018, the Agency personally served a copy of the notice of the section 366.26 hearing on father at the Sacramento County Main Jail. On April 2, 2018, the Agency filed an order for prisoner's appearance at hearing affecting parental rights on behalf of father.

The June 27, 2018 section 366.26 report stated father was incarcerated in the Sacramento County Main Jail, was ineligible for bail, and did not have a projected release date. The minors were reportedly thriving in their placement with and bonded to their caretakers, the maternal grandparents. The Agency recommended termination of parental rights.

Father failed to appear for the June 27, 2018 section 366.26 hearing. At mother's request, the court set the matter for a contested hearing on August 6, 2018.

On July 5, 2018, the Agency filed an order for prisoner's appearance at hearing affecting parental rights on behalf of father.

On July 10, 2018, father's counsel filed an order for prisoner's appearance at hearing affecting parental rights on behalf of father.

On July 18, 2018, the Agency filed proof of service of the notice of the section 366.26 hearing on father at the RCCC.

Father was not present at the August 6, 2018 section 366.26 hearing. Father's counsel informed the court that father was incarcerated and "was not transported today." The Agency indicated it was prepared to proceed with the hearing and submitted the June 27, 2018 report into evidence. Father's counsel objected to the recommendation to terminate father's parental rights and stated: "I filed a transport order back on July 5th for father. This is the second time I filed a transport order. He was not transported. Website says his outdate is September 9th. He is at Consumnes. I will ask for a continuance for him to get here, if the Court allows me to do that." The court responded, "I am not prepared to do that. This is the court date, and we are ready to proceed." Father's counsel objected and then left the proceedings after the court granted his request to be "excused for the rest of the trial." After finding notice had been given as required by law, hearing witness testimony, and considering documentary evidence, the court terminated parental rights.

Father filed a timely notice of appeal.

## DISCUSSION

Father contends the juvenile court committed prejudicial error when it conducted the section 366.26 hearing in his absence. The Agency concedes the error but argues it was harmless because nothing in the record demonstrates father would have achieved a better outcome had he been present at the hearing.

Penal Code section 2625 provides that when a parent is incarcerated, no proceeding seeking to terminate parental rights may be held without the physical presence of the incarcerated parent or the parent's attorney, unless the parent gives the court a written waiver of the right to be present. If there is no written waiver, the court must order the parent to be transported to the hearing. (Pen. Code, § 2625, subd. (d).) This provision applies to the proceedings specified in subdivision (b) of Penal Code section 2625, which include section 366.26 hearings. (*In re Barry W.* (1993) 21 Cal.App.4th 358, 369.)

In enacting Penal Code section 2625, the Legislature created a scheme under which state prisoners may physically appear at the termination hearing if they wish. (*In re Gary U.* (1982) 136 Cal.App.3d 494, 498.) "The Legislature contemplated the scheme would trigger on a simple court order directed to the warden of the state prison involved. This device can only be assured of success in California where the custodian is subject to the mandate of [Penal Code] section 2625 and the jurisdiction of the requesting court." (*Gary U., supra*, at pp. 498-499.)

Here, father's right under Penal Code section 2625, subdivision (d) to be present at the section 366.26 hearing was invoked by his counsel's request for a continuance and objection to the court's decision to commence the hearing in father's absence. The court nonetheless elected to proceed in father's absence and over counsel's objection. The Agency concedes the court erred in doing so, and we agree.

The issue before us, then, is whether the court's error was harmless, that is, whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; see *In re Jesusa V.* (2004) 32 Cal.4th 588, 624-625 [harmless error analysis applies to violation of Pen. Code, § 2625, subd. (d)].) After careful review of the record in this matter, we conclude the error was harmless.



Father asserts he was prejudiced because he was unable to testify or present evidence about his bonded relationship with the minors and, in particular, about his visitation and contact with the minors for purposes of challenging the termination of his parental rights pursuant to section 366.26, subdivision (c)(1)(B)(i). We are not persuaded.

“One exception to adoption is the beneficial parental relationship exception. This exception is set forth in section 366.26, subdivision (c)(1)(B)(i), which states: ‘[T]he court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.’ [Citation.] The [parent] has the burden of proving [the parent’s] relationship with the children would outweigh the well-being they would gain in a permanent home with an adoptive parent. [Citations.]” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300.)

“Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The factual predicate of the exception must be supported by substantial evidence, but the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re K.P.* (2012) 203 Cal.App.4th 614, 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

At the termination hearing, father’s counsel did not make an offer of proof as to what evidence father would offer regarding application of the beneficial parental relationship exception. Indeed, counsel inexplicably requested and was granted permission to be excused from the hearing. In any event, in father’s reply brief on

appeal, father claims he would have presented evidence regarding his weekly “iWeb” Internet visits with the minors, the details of which he claims could only have been conveyed to the court by his testimony.<sup>2</sup> In particular, father claims that “[t]hroughout this case, [he] received weekly web visits with the children, at which he was engaged and attentive to them.” He also claims the fact that he was able to maintain the minors’ attention through Internet visits was evidence of a parent-child bond that lasted even when father was not physically present. We do not share father’s narrow view of the record.

The disposition report, which is the only evidence cited by father in support of his claim, was filed in September 2016, just two months after the filing of the original dependency petition, and nearly two years before the section 366.26 hearing. In the 21 months between September 2016 and the June 2018 termination hearing, father’s contact and visitation with the minors became much more sporadic due, in large part, to his pattern of incarceration, release, and reincarceration, and his refusal to participate in services. In fact, father’s first in person supervised visit with the minors on June 6, 2017, was terminated early due to his reported aggressive behavior toward staff. While father had supervised visits with the minors once a week after his January 2018 release from incarceration, as of March 1, 2018, he had yet to complete a drug and alcohol program or a domestic violence batterer’s program or to address the issues that led to the initial detention.

The record in this case makes plain that despite resources and numerous opportunities made available to father during this lengthy dependency case, father made

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<sup>2</sup> Some details of father’s weekly “iWeb” Internet visits with his children are in the record. For instance, in the September 15, 2016 disposition report, the maternal grandmother who supervised the visits “indicate[d] that [father was] engaged and attentive to the children during his visits.”

minimal to no progress toward alleviating or mitigating the causes necessitating removal of the minors, had “dysfunctional dynamics” with mother and “emotional deregulation and manipulative tendencies” generally, and refused to comply with any of his case plan services, resulting in his termination from drug court in June 2017 and termination of his reunification services in September 2017.

Father also contends the court’s error was prejudicial because he was unable to testify about the relationship between the minors and mother. Again, we are not persuaded. The court had before it numerous reports regarding all aspects of mother’s relationship with the minors. More importantly, mother testified at the hearing and was subject to cross-examination by the parties and questioning by the court. Father provides no hint of what his testimony about the mother would have entailed, how he could have added to what was already before the court, or how it would have led to a more favorable result for *him*.

Given the dearth of evidence in the record to support father’s claim that he maintained regular visitation and contact with the minors or that the minors would benefit from continuing their relationship with father, and considering that the record contradicts father’s putative testimony regarding a close bond with the minors via a limited number of “iWeb” Internet visits while he was incarcerated, we conclude it is not reasonably probable that father’s presence at the section 366.26 hearing would have changed the outcome. Therefore, any error in conducting the hearing in his absence was harmless. (*People v. Watson, supra*, 46 Cal.2d at pp. 836-837.)

DISPOSITION

The juvenile court's orders are affirmed.

\_\_\_\_ KRAUSE \_\_\_\_\_, J.

We concur:

\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_ BUTZ \_\_\_\_\_, J.